

NORTHWEST ENVIRONMENTAL ADVOCATES



July 3, 2013

FREEDOM OF INFORMATION ACT REQUEST

FOIA OFFICER
U.S. Environmental Protection Agency
1200 Sixth Avenue, CEC-124
Seattle, Washington 98101

Via E-Mail: r10.foia@epa.gov

Re: EPA Action or Lack of Action on Provisions in Idaho's Water Quality Standards that Exempt Nonpoint Sources from Compliance with Standards

To whom it may concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA).

NWEA is a non-profit environmental watchdog organization dedicated to preserving and protecting natural resources in the Pacific Northwest. NWEA works through education, advocacy, and litigation to protect and restore water in Washington, Idaho, and Oregon. The organization has a long history of interest and involvement in environmental issues in the Pacific Northwest, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This FOIA request concerns EPA's actions, or lack thereof, on certain provisions in Idaho's water quality standards rules related to exemptions for nonpoint sources. The sections which are the subject of this request are as follows, with text provided where only a specific portion is relevant, and dates provided from Idaho rules that may or may not be indicative of the date the rules were finalized by Idaho:

- IDAPA 58.01.02.350.01.a (April 5, 2000)
- IDAPA 58.01.02.350.01.b (December 31, 1999)
- IDAPA 58.01.02.350.02.a (July 1, 1993 with minor deletions dating to March 29, 2012)
- IDAPA 58.01.02.200.01. (August 24, 1994) "These materials do not include suspended sediment produced as a result of nonpoint source activities."
- IDAPA 58.01.02.200.02 (August 24, 1994) "These substances do not include suspended sediment produced as a result of nonpoint source activities."
- IDAPA 58.01.02.200.03 (August 24, 1994) "These materials do not include suspended sediment produced as a result of nonpoint source activities."
- IDAPA 58.01.02.200.05. (August 24, 1994) "This matter does not include suspended sediment produced as a result of nonpoint source activities."

www.NorthwestEnvironmentalAdvocates.org

P.O. Box 12187, Portland, OR 97212-0187 Phone (503) 295-0490 Fax Upon Request

Printed on 100% post-consumer recycled, non-de-inked, non-rebleached paper

I. FOIA Request

In answering this request, please consider “documents” to include: reports, memoranda, internal correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, and summaries of conversations and interviews, computer records, and other forms of written communication, including internal staff memoranda. In your response, please identify which documents correspond to which requests below. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

We emphasize that this request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide all documents prepared or utilized by, in the possession of, or routed through EPA related to:

1. EPA action or lack of action pursuant to Clean Water Act Section 303(c)(3) on the seven subsections, or portions of subsections as applicable, of Idaho’s water quality standards rules enumerated above. Included in this request are Idaho’s submissions of these subsections to EPA for approval. If EPA locates and provides documents that demonstrate it took an approval action on a particular subsection, the search and response may be limited to the formal approval documents, notwithstanding the scope of this request as established above. Likewise, if EPA locates and provides documents that demonstrate EPA decided to take no action, the response may similarly be limited.

If there are large documents that you suspect we may already have, please feel free to call us and ask in order to avoid waste and/or delay. If there are any other materials or categories of materials that you do not believe we would find useful, please contact us to discuss a possible narrowing of this request.

II. Fee Waiver Request

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii).

A. Whether the subject of the requested records concerns “the operations or activities of the government.”

This request concerns documents pertaining to whether EPA did or did not take action on submissions from IDEQ that put in place rules that exempt nonpoint sources from having to meet certain water quality standards. State nonpoint source exemptions undermine the efficacy of water quality standards and were recently found by a federal court in Oregon to require EPA action. EPA’s action or decision to not take action on Idaho’s submissions concerns the operations of the government because EPA action on such provisions is required under the Clean Water Act. Therefore, this fee waiver request involves records that are readily identifiable as limited to “the operations or activities of the government,” specifically in this instance the operations and activities of the U.S. EPA to approve, disapprove, or decide to take no action on submitted water quality standards rules.

B. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

EPA’s actions on state water quality standards is sometimes available on EPA’s websites. In instances where EPA has taken action, sometimes EPA elaborates on rules on which EPA chose to not take action. Otherwise, records concerning EPA’s decision to not take action or to postpone action are not available to the public. Depending on the year in which states submitted rules to EPA for action, pre- or post-“Alaska Rule” at 40 C.F.R. § 131.21(c), a state’s water quality standards are or are not in place for Clean Water Act purposes. Therefore, in the absence of information on EPA’s actions, it is often impossible to determine whether particular standards, or rules (e.g., general policies) are applicable or not. Without access to EPA records there is no mechanism by which the public can gain insight into whether particular provisions in state rules are approved or applicable. Accordingly, the disclosure of records that will indicate whether EPA has approved, disapproved, or taken no action, along with records that provide the date of the state submission to EPA that governs the applicability of the Alaska Rule, are essential to the public understanding what rules EPA considers to be in force in Idaho’s water quality standards. Release of the requested records will allow the public to understand what action EPA has taken on provisions that may release nonpoint sources across Idaho from meeting water quality standards. The applicability of such rules may have significant ramifications for the development of Total Maximum Daily Loads and discharger permits. Because TMDLs must demonstrate a reasonable assurance that nonpoint sources will be controlled if the TMDL is to provide an allocation to point sources to discharge, the applicability of the standards to nonpoint sources is highly relevant to EPA’s own permitting program in Idaho. In order that NWEA may evaluate EPA’s ongoing involvement in the approval of Idaho TMDLs and the development of discharge permits, NWEA needs access to the records that demonstrate whether EPA acted or failed to act on the submitted provisions. For this reason, reviewing records of EPA’s action or inaction will be “meaningfully informative” and is therefore likely to contribute to an understanding of what standards are actually in place in Idaho and the policy and regulatory ramifications associated with those facts. Having such information is also “meaningfully informative” in that it ensures NWEA and other organizations do not engage in frivolous or unfounded litigation.

C. Whether disclosure of the requested information will contribute to “public understanding.”

Disclosure of the requested records to NWEA will contribute to public understanding because

the organization has expertise in this subject area of the records, an intention to disseminate the information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records. NWEA has a track record of working with people as far away from Oregon as the State of Florida to assist them by conveying our understanding of EPA policies. NWEA is known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations across the country which are interested in ensuring that water quality standards are sufficiently protective of human health, fish, and wildlife. More specifically, environmental organizations and tribal governments in and downstream of Idaho are interested in Idaho water quality and its regulation and are particularly concerned that nonpoint sources are a primary cause of water quality impairments. In the past, NWEA has shared similar information with state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share such records as well as information analyzed from records with this same list of interests.

In addition to using its relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means: through the internet from its website, through commentary to the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, and through formal public comments and other formal documents prepared for agencies.

NWEA's investigation and evaluation of the records will be made available to many other parties after it has been completed. NWEA will use the records requested to evaluate the quality of EPA decision-making and to better facilitate public participation in state and EPA processes during triennial reviews, TMDL development, and permit issuances, all of which occur regularly. NWEA's dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of EPA's guidance and regulations insofar as they affect permitting and water quality credit trading. Thus, the release of these records will significantly contribute to the public's understanding and oversight of EPA's decision-making under the Clean Water Act.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in all regulatory processes that take place under the Clean Water Act. NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations involved in state water credit trading and related regulatory activities through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through its website.

D. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Courts have held that the factor of whether the disclosure will contribute "significantly" to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government's activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir.

1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at *8 (D.D.C. 1998). The requested information has not, to the best of NWEA's knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass'n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Ore. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver).

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors' statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver Therefore, in light of [Western Watersheds Project's] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM's position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress' intent to have the fee waiver liberally construed.

Western Watersheds Project v. BLM, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a "close call" as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10th Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM*, 402 F. Supp 82 (2005) held that an organization's statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, as in some of the fee waiver requests addressed in this appeal, the records concern agency inaction, a court has found that a requestor's statements concerning the agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of the State of Idaho in light of EPA's actions and inactions. It will also contribute to the ability of NWEA and others to oversee the activities of the EPA, with regard to CWA standards, TMDLs, and permits. As discussed above, NWEA participates in state rulemaking, in EPA review of state rulemaking, in permitting actions and the issuance of TMDLs, and in litigation. It also shares documents and information with other organizations that engage in those activities. NWEA will also disseminate the information to organizations through listserves, websites, meetings, memoranda, and direct sharing of the records. Only by understanding the EPA's actions and inactions can NWEA meaningfully participate in its public oversight watchdog function.

E. Commercial interests.

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g., VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002)(VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Pacific Northwest and across the country. Therefore, the considerations of 40 C.F.R. 2.107(l)(1) with regard to the possible commercial interests of NWEA do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request.

We look forward to your response. Please feel free to contact me at 503/295-0490 or nbell@advocates-nwea.org if you have any questions about how to respond to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell", with a stylized, flowing script.

Nina Bell
Executive Director